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Supreme Court, U.S.
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No. 93-561

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

CREDIT BUILDERS OF AMERICA, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

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October 28, 1993

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PETITIONER'S SUPPLEMENTAL BRIEF

The same day Petitioner MCI Telecommunications Corporation ("MCI") filed the petition pending herein,[1] the Sixth Circuit issued a decision holding that a federal district court has subject matter jurisdiction over an action by a communications common carrier to collect interstate tariff charges.[2] The Fifth Circuit's decision—the subject of this petition—conflicts directly with the Sixth Circuit's ruling.

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[1] MCI's Rule 29.1 list appears in the Petition for Writ of Certiorari at page ii. This list is currently accurate.

[2] MCI's petition cites to the case decided by the Sixth Circuit as *MCI Telecommunications Corporation v. Graham*, No. 92-6270 (6th Cir. docketed Sept. 30, 1992). Petition, p. 10. MCI's claims in *Graham* differed from those MCI raised against respondent Credit Builders of America only with respect to the identity of the defendant and the amount claimed.

The Sixth Circuit's opinion in *MCI Telecommunications Corporation v. Graham*, No. 92-6270 (6th Cir. Oct. 8, 1993), reprinted in the Appendix hereto, recognizes that where MCI provides service pursuant to the terms of its federal tariff, the tariff is " 'the law, not [a] mere contract[].' " In such a situation, "the duty to pay a certain price for phone service is a federal obligation", and "MCI's ability to instigate suit is premised upon federal law." Thus, a complaint to collect interstate tariff charges arises under federal law. (p. 3a, *infra*).

The Sixth Circuit finds additional support for its jurisdictional conclusion from this Court's decisions that actions to collect interstate freight charges arise under the Interstate Commerce Act,[3] and from the genesis of the Communications Act and its commonalities with the Interstate Commerce Act. (pp. 3a-4a, *infra*). The Sixth Circuit concludes that it would be incongruous to impose a different jurisdictional rule under the Communications Act than under the Interstate Commerce Act. (p. 4a, *infra*).

The Sixth Circuit acknowledges the circuit split created by the Fifth Circuit decision at issue in this petition. The Sixth Circuit expressly chooses to follow the Second Circuit decision in *Ivy Broadcasting Company v. American Telephone & Telegraph Company*, 391 F.2d 486 (2d Cir. 1968), and the Eighth Circuit decision in *MCI Telecommunications Corporation v. Garden State Investment Corporation*, 981 F.2d 385 (8th Cir. 1992)—the two authorities discussed at length in MCI's petition—rather than the Fifth Circuit decision at issue here. (p. 3a, *infra*).

The Fifth Circuit's judgment now conflicts with the Sixth Circuit, as well as the Second, Third, and Eighth Circuits. This development reinforces the need for immediate resolution of the conflict. For the reasons stated

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[3] *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533 (1983); *Louisville & N. R.R. v. Rice*, 247 U.S. 201 (1918).

in the petition and this supplemental brief, the petition should be granted and the Fifth Circuit's judgment should be summarily reversed.

Respectfully submitted,

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October 28, 1993

APPENDIX

APPENDIX

No. 92-6270

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MCI TELECOMMUNICATIONS CORPORATION,
Plaintiff-Appellant,
v.

DAVID GRAHAM, individually and d/b/a
GRAHAM CONSTRUCTION COMPANY,
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Tennessee

Decided and Filed October 8, 1993

Before: BOGGS and SILER, Circuit Judges; and JOINER, Senior District Judge.*

BOGGS, Circuit Judge. This is an appeal from a judgment of the district court dismissing the complaint for lack of subject matter jurisdiction. Because we find that the complaint "arises under" federal law, we reverse.

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* The Honorable Charles W. Joiner, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

I

Appellant MCI provided telecommunication services to the appellee Graham between April 1991 and October 1991 under the terms and conditions of MCI F.C.C. Tariff No. 1 (tariff). This tariff is filed and maintained with the F.C.C. pursuant to 47 U.S.C. § 203. On October 13, 1991, MCI terminated Graham's service because Graham failed to pay his bill. MCI then demanded payment of $18,097.40, plus costs and attorney's fees. When Graham refused to make payment, MCI brought the present suit in federal court. The district court *sua sponte* dismissed the case for lack of subject matter jurisdiction.[1] MCI then brought this timely appeal.

II

The question of whether a claim "arises under" federal law is determined according to the "well-pleaded complaint" rule. *Merrell Dow Pharmaceuticals, Inc. v. Thompson,* 478 U.S. 804, 808 (1986). Courts must determine whether the complaint raises a substantial federal question. This court has stated that this standard is "easily met" and that "an *arguably* plausible claim must be allowed to proceed." *In re Bendectin Litig.,* 857 F.2d 290, 300 (6th Cir. 1988) (emphasis in original) (citing *Robbins v. Reagan,* 780 F.2d 37, 43 (D.C. Cir. 1985)), *cert. denied,* 488 U.S. 1006 (1989).

In this case, the appellant satisfied this standard. Tariffs filed with the F.C.C. conclusively and exclusively control the rights and liabilities between a carrier and its customer. Carriers must, *inter alia,* file tariffs with the F.C.C., 47 U.S.C. § 203(a), (c); furnish communication services when presented with a reasonable request, *id.* § 201(a); charge reasonable rates, *id.* § 201(b); and

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[1] The district court relied upon the district court opinion in *MCI Telecommunications Corp. v. Garden State Inv. Corp.,* 791 F. Supp. 785 (D. Minn.). However, this decision was subsequently reversed. 981 F.2d 385 (8th Cir. 1992).

notify the public of any changes in the rate structure, *id.* § 203(b). Violation of any of these provisions is subject to penalty. *Id.* §§ 202(c) and 206. MCI provided service to Graham according to the terms of these federal regulations, and MCI's ability to collect money owed is premised upon complying with these various provisions. *Id.* § 203(c). Thus, MCI's ability to instigate suit is premised upon federal law.

The present case is similar to both *Ivy Broadcasting Co. v. American Tel. & Tel. Co.*, 391 F.2d 486 (2d Cir. 1968) and *MCI Telecommunications Corp. v. Garden State Inv. Corp.*, 981 F.2d 385 (8th Cir. 1992). In *MCI*, the telecommunications company brought an action because Garden State had failed to pay its long-distance bill. The district court dismissed *sua sponte* for lack of federal subject matter jurisdiction. However, the Eighth Circuit reversed, holding that the district court "overlook[ed] the fact that federal tariffs are the law, not mere contracts." *Id.* at 387. Thus, a complaint to collect "arises under" federal law. The duty to pay a certain price for phone service is a federal obligation. This result has been reached by other courts that have addressed the issue. *See, e.g., MCI Telecommunications Corp. v. Mosey*, No. 92-CV-542E(H) (W.D.N.Y. Oct. 8, 1992); *MCI Telecommunications Corp. v. Diversified Human Resources Group*, No. CA 3-92-0192-T (N.D. Tex. Mar. 14, 1992); *MCI Telecommunications Corp. v. First Am. Capital Resources, Inc.*, 1989 U.S. Dist. LEXIS 12879 (N.D. Ill. Oct. 30, 1989). *But see MCI Telecommunications Corp. v. Credit Builders of Am., Inc.*, 980 F.2d 1021 (5th Cir.) (concluding that suit to collect unpaid charges did not present federal question), *cert. granted and judgment vacated to consider mootness*, 113 S. Ct. 2925 (1993).

MCI's position is further supported by the case law that has interpreted the Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.* Historically, under the Interstate Com-

merce Act, federal courts have exercised subject matter jurisdiction over suits by interstate carriers seeking to collect freight charges. *Thurston Motor Lines v. Jordan K. Rand, Ltd.*, 460 U.S. 533 (1983) (per curiam); *Louisville & Nashville Ry. v. Rice*, 247 U.S. 201 (1918). Congress had originally regulated common carriers who were engaged in interstate telephonic communications by amending the Interstate Commerce Act to include communications carriers within the jurisdiction of the Interstate Commerce Commission. Act of June 18, 1910, ch. 309, sec. 7, § 1, 36 Stat. 539, 544-45. Later, Congress transferred that jurisdiction to the Federal Communications Commission when it enacted the Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified, as amended, at 47 U.S.C. § 151 *et seq.*). Still, the two Acts share a number of similarities. For example, both require that tariffs be filed with the government and be implemented thereafter without any deviations. *Compare* 47 U.S.C. § 203 *with* 49 U.S.C. § 10761. Indeed, both Acts impose numerous obligations on the carriers that they regulate.

Like the Interstate Commerce Act, the Communications Act is comprehensive legislation. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 167 (1968). Additionally, the same kinds of uniformity concerns that give rise to federal subject matter jurisdiction under the Interstate Commerce Act also underlie the Communications Act. 47 U.S.C. § 151; *see also* John R. Haring and Kathleen B. Levitz, *The Law and Economics of Federalism in Telecommunications*, 41 Fed. Comm. L.J. 261 (1989) (demonstrating the importance of uniformity in interstate common carrier matters). Based upon the legislative history that underlies the Communications Act of 1934, and because of that Act's continuing similarities with the Interstate Commerce Act from which it springs, it would be incongruous to impose a different jurisdictional rule under the Communications Act than under the Commerce Act. Ultimately, a user's obligation to make payments for inter-

state telephone service at the rate fixed by tariff " '[grows] out of and [depends] upon' the Communications Act in the same way that a shipper's duty to pay for interstate freight service depends upon the Interstate Commerce Act." *Ivy Broadcasting Company*, 391 U.S. at 494 (quoting *Louisville & Nashville*, 247 U.S. at 202).

For these reasons, the district court's judgment is REVERSED.